

# CONTRACTING OVERSIGHT FOR SMALL BUSINESS JOBS ACT OF 2012

DECEMBER 21, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GRAVES of Missouri, from the Committee on Small Business,  
submitted the following

## R E P O R T

[To accompany H.R. 4206]

[Including cost estimate of the Congressional Budget Office]

The Committee on Small Business, to whom was referred the bill (H.R. 4206) to amend the Small Business Act to provide for increased penalties for contracting fraud, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

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### I. AMENDMENT

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 2, line 25, strike “relating to the following section.” and insert “relating to section 1040 the following:”.

Page 3, line 6, insert “LIMITATION ON LIABILITY.—” after “(3)”.

Page 4, line 6, insert after the period the following: “On the date that the Administrator issues the compliance guide under this section, the Administrator shall also issue a version of the compliance guide translated into Spanish and such translation may be provided in digital form by the Administrator.”.

Page 7, line 5, strike “16(d)(2)” and insert “16(d)(2)(C)”.

Page 7, line 6, strike “645(d)(3)” and insert “645(d)(2)(C)”.

## II. PURPOSE AND BILL SUMMARY

The purpose of H.R. 4206, the “Contracting Oversight for Small Business Jobs Act of 2012,” is to amend the Small Business Act (the Act)<sup>1</sup> and the criminal code relating to false statements<sup>2</sup> in order to reduce fraud within small business contracting by increasing penalties, while enhancing transparency and protecting small business owners making a good faith effort to comply with complicated contracting and size rules. The Small Business Administration (SBA) oversees six small business preferential contracting programs. Under current law, if a company commits fraud within the SBA’s contracting programs there is little recourse; as the cost to prosecute outweighs the recovery amount. This bill resolves this discrepancy by increasing penalties from \$250,000 to \$1,000,000 or twice the value of the fraudulently obtained contract, whichever is greater, thereby ensuring it is cost-effective for the government to prosecute these bad actors.

This legislation also recognizes the need for increased transparency in the suspension and debarment process. H.R. 4206 requires the SBA to publish the standard operating procedures for suspension and debarment delineating how the agency will conduct suspensions and debarments. This bill also requires SBA to submit an annual report to the House Small Business Committee and the Senate Small Business and Entrepreneurship Committee on suspension and debarment actions taken by the SBA during the preceding year. Additionally, this bill provides a statutory framework for the Office of Hearings and Appeals to decide which businesses are truly small.

H.R. 4206 further recognizes that many small business owners in attempting to comply with the complex regulations found in federal contracting may inadvertently misrepresent themselves. The bill provides a safe harbor provision, which protects a small business owner from these fraud provisions if the firm relied in good faith on a licensed attorney’s written opinion.

<sup>1</sup>Originally, title II of the Act of July 30, 1953, c. 282, 67 Stat. 232 was designated as the Small Business Act of 1953. A plethora of amendments in subsequent Congresses led to a rewrite in 1958. Pub. L. No. 85–536, § 1, 72m Stat, 384 (1958). The Act is codified at 15 U.S.C. §§ 631–657q.

<sup>2</sup>18 U.S.C. § 1001–40.

### III. NEED FOR LEGISLATION

The Act iterates Congress's belief in the importance of small business participation in federal prime contracts and the resultant subcontracts. Specifically, the Act directs that:

To effectuate the purpose of this Act, small-business concerns within the meaning of this Act shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchase and contracts for property and services for the Government in each industry category are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government be made to small-business concerns.<sup>3</sup>

To effectuate these objectives, Congress has enacted six different contract programs overseen by the SBA's Office of Government Contracting and Business Development. Each of these programs has a statutory goal associated with it, related to the percentage of prime contract dollars the government should award to qualifying firms each year. These programs are the Small Business Contracting Program, Historically Underutilized Business Zone (HUBZone) Small Business Program, Women-Owned Small Business (WOSB) program, 8(a) Business Development (8(a)) program, Small Disadvantaged Business (SDB) programs, and the Service Disabled Veteran-Owned Small Business (SDVOSB) programs.

Fraud in the small business contracting results in three types of harms. First, there is the loss to small businesses. Legitimate small businesses are negatively affected by bad actors who seek to take advantage of these programs. When contracts go to firms that do not qualify for, or which are not following the rules associated with, a contracting program, legitimate firms are denied the right to perform on a contract. Second, there is loss to the government. When firms that misrepresent themselves as small businesses receive contracts, the government's statutory procurement goals are skewed. Bad actors also harm the reputations of legitimate small businesses, so contracting officers are more reluctant to use these programs, which in turn results in less competition and a less vibrant industrial base. Finally, the American people suffer because firms that misrepresent their status may not need to hire new employees, undermining the job creating power of legitimate small businesses.

In small business procurement programs, there are six reoccurring types of fraud: misrepresentations of size, program specific misrepresentations, pass-through contracts, violations of the non-manufacturer rule, incorrect assignment of size standards to contracts, and recurring acts of bribery and kickbacks. Notably over the past few years, these types of fraud within small business contracting have become more pervasive. For example, in a 2008 Gov-

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<sup>3</sup> 15 U.S.C. § 644(a).

ernment Accountability Office (GAO) report, GAO was able to successfully certify four bogus firms, and easily identified ten firms in Washington, DC that did not meet the program requirements but still received over \$100 million in contracts.<sup>4</sup> Likewise, GAO was able to obtain certification for one bogus 8(a) firm, although three other bogus applicants were rejected based on capacity rather than on their fraudulent status, and GAO found 14 firms received \$325 million in set-aside and sole-source contracts through the 8(a) program even though the firms were not eligible for the 8(a) program.<sup>5</sup>

In an attempt to address these problems, the Small Business Jobs Act of 2010 (Jobs Act) created a presumption of loss when firms engage in this type of conduct.<sup>6</sup> In pertinent part, the Jobs Act stated:

In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation.<sup>7</sup>

However, when applying this provision, agencies are still offsetting the harm to the government by the value of the goods or services received. As a contracting officer is not allowed to award a contract under the small business programs unless the contracting officer believes the government is paying a fair and reasonable price, the value of the contract completely offsets the statutory presumption of loss.

Additionally, for the 8(a) and HUBZone programs, a firm can only be listed in the System for Award Management (SAM) as a participant if they have been certified by SBA, but this certification does not necessarily indicate that the firm is meeting the program requirements.<sup>8</sup> In self-certification programs, the possibility of abuse is even higher. For example, GAO “identified 10 case-study examples of firms that did not meet SDVOSB program eligibility requirements [but which] received approximately \$100 million in SDVOSB contracts, and over \$300 million in additional dollars of 8(a), HUBZone, and non-SDVOSB federal government contracts.”<sup>9</sup>

Further in 2010, a Washington Post exposé drew attention to additional fraud within small business contracting. In one instance, it was revealed that the large subcontractor, a firm called GTSI, would “lead the work and receive 99.5 percent of the revenue, even though it was a subcontractor and MultimaxArray was the

<sup>4</sup> GAO, HUBZone Program: SBA’s Control Weaknesses Exposed the Government to Fraud and Abuse (2008) (GAO-08-964T).

<sup>5</sup> GAO, 8(A) Program: Fourteen Ineligible Firms Received \$325 Million in Sole-Source and Set-Aside Contracts (2010) (GAO-10-425).

<sup>6</sup> Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1341, 124 Stat. §§ 2504, 2543 (2010).

<sup>7</sup> *Id.*

<sup>8</sup> SAM is the official federal registry of prospective federal contractors, and allows contracting officers to conduct market research regarding capabilities.

<sup>9</sup> GAO, Service-Disabled Veteran-Owned Small Business Program: Case Studies Show Fraud and Abuse Allowed Ineligible Firms to Obtain Millions of Dollars in Contracts, 4-5 (2010) (GAO-10-108).

‘prime.’”<sup>10</sup> In another, a large firm negotiated to receive 75 percent of the profits on over \$166 million in set-aside task orders under a Department of Homeland Security indefinite delivery, indefinite quantity (ID/IQ) contract, and SBA later found that the small business prime contractor “had little to no involvement in the performance of contracts.”<sup>11</sup> Likewise, US2, a small business with only \$73,000 in revenue and run from the owner’s living room, was awarded an Army sole-source contract for \$250 million.<sup>12</sup>

Despite these reports, the majority of small business owners are law-abiding citizens who attempt to comply with complicated size standards and contracting rules. In some cases, the misrepresentation can be a good-faith error. For example, a company may not understand that it could be affiliated with another firm based on identity of interest, such as the other firm being owned by a sibling. Thus, two unrelated businesses could be considered affiliated by SBA, and their combined receipts and employees could place them above the relevant size standard.<sup>13</sup>

Due to the challenges cited previously, legislation that balances the concerns of legitimate small business owners with the need to combat fraud throughout the SBA’s small business contracting programs is necessary. In order for the small business programs to accomplish their statutory goals of promoting a healthy industrial base and increasing competition, particularly among small firms, the programs must operate in a transparent manner that minimizes the risk of fraud and misrepresentation. In doing so, this will free legitimate small businesses to innovate, create jobs, and increase competition.

#### IV. HEARINGS

During the 112th Congress, the Subcommittee on Investigations, Oversight and Regulations held a hearing related to matters addressed by H.R. 4206. The hearing was entitled “Misrepresentation and Fraud: Bad Actors in the Small Business Procurement Programs,” and held on October 27, 2011. The Subcommittee examined whether there are sufficient monitoring mechanisms in place to detect fraud and misrepresentation, and how these processes could be improved.

#### V. COMMITTEE CONSIDERATION

The Committee on Small Business met in open session, with a quorum being present, on March 22, 2012, and ordered H.R. 4206 reported, as amended, to the House by a voice vote at 11:25 am. During the markup, one amendment and a perfecting amendment were offered. Both the amendment and the perfecting amendment were adopted. Disposition of the amendments is addressed below and is based on the order amendments were filed with the Clerk

<sup>10</sup> Robert O’Harrow, In Deals between Alaska Corporation and D.C. Area Contractor, A Disconnect, Washington Post, October 1, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007348.html?sid=ST2010092907225>.

<sup>11</sup> Letter from Michael Chodos, Suspension and Debarment Official, SBA, to Scott W. Friedlander, President and Chief Executive, GTSI Corporation (October 10, 2011) available at <http://www.govexec.com/pdfs/100510rb1b.pdf>.

<sup>12</sup> Robert O’Harrow, Audit: Army, Interior Broke Law by Awarding Contract to Alaska Native Corporation, Washington Post, August 17, 2011.

<sup>13</sup> 13 CFR § 121.103(f).

of the Committee and not necessarily in the order that they were considered at the markup.

Amendment Number One filed by Ms. Hahn (D-CA) requires that any Small Business Compliance Guide issued under this section also be made available in Spanish. Amendment Number One was adopted by a roll call vote of 12 to 11 at 11:17 a.m.

A perfecting Amendment to Amendment Number One filed by Mr. Cicilline (D-RI) requires such translation be provided in digital form by the Administrator. The perfecting amendment was adopted by a roll call vote of 14 to 9 at 11:21 a.m.

#### VI. COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report the legislation and amendments thereto.

#### AMENDMENT TO H.R. 4206 OFFERED BY MS. HAHN OF CALIFORNIA

Page 4, line 6, insert after the period the following: “On the date that the Administrator issues the compliance guide under this section, the Administrator shall also issue a version of the compliance guide translated into Spanish.”

# **COMMITTEE ON SMALL BUSINESS**

HR 4206  
DATE: 3/22/2012  
ROLL CALL: 2  
AMENDMENT NUMBER: 1  
VOTE: 12 (AYE) 11 (NO)

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. GRAVES, Chairman		X		
Dr. BARTLETT	X			
Mr. CHABOT		X		
Mr. KING				X
Mr. COFFMAN		X		
Mr. MULVANEY		X		
Mr. TIPTON	X			
Mr. LANDRY				X
Ms. HERRERA BEUTLER		X		
Mr. WEST		X		
Mrs. ELLMERS		X		
Mr. WALSH		X		
Mr. BARLETTA		X		
Mr. HANNA		X		
Mr. SCHILLING		X		
Ms. VELAZQUEZ, Ranking Member	X			
Mr. SCHRADER	X			
Mr. CRITZ	X			
Ms. CLARKE	X			
Ms. CHU	X			
Mr. CICILLINE	X			
Mr. RICHMOND				X
Ms. HAHN	X			
Mr. PETERS	X			
Mr. OWENS	X			
Mr. KEATING	X			
<b>TOTALS</b>	<b>12</b>	<b>11</b>		

Perfecting Amendment to Amendment 1 to H.R. 4206 Offered by  
Mr. Cicilline of Rhode Island

Add after Spanish:  
and such translation may be provided in digital form by the Administrator.

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### COMMITTEE ON SMALL BUSINESS

HR 4206

DATE: 3/22/2012

ROLL CALL: 1

AMENDMENT NUMBER: Perfecting Amendment to Amendment 1

VOTE: 14 (AYE) 9 (NO)

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. GRAVES, Chairman		X		
Dr. BARTLETT	X			
Mr. CHABOT		X		
Mr. KING				X
Mr. COFFMAN		X		
Mr. MULVANEY		X		
Mr. TIPTON	X			
Mr. LANDRY				X
Ms. HERRERA BEUTLER		X		
Mr. WEST		X		
Mrs. ELLMERS		X		
Mr. WALSH		X		
Mr. BARLETTA		X		
Mr. HANNA	X			
Mr. SCHILLING	X			
Ms. VELAZQUEZ, Ranking Member	X			
Mr. SCHRADER	X			
Mr. CRITZ	X			
Ms. CLARKE	X			
Ms. CHU	X			
Mr. CICILLINE	X			
Mr. RICHMOND				X
Ms. HAHN	X			
Mr. PETERS	X			
Mr. OWENS	X			
Mr. KEATING	X			
<b>TOTALS</b>	<b>14</b>	<b>9</b>		

## VII. SECTION-BY-SECTION ANALYSIS OF H.R. 4206

## SECTION-BY-SECTION ANALYSIS OF H.R. 4206 AS AMENDED

*Section 1—Short title*

This section provides that the bill may be cited as the “Contracting Oversight for Small Business Jobs Act of 2012”

*Section 2—Increased penalties for fraud**Subsection (a)—In General*

Subsection (a) adds a new Section 1041 to the Title 18 of the United States Code. Section 1001 of Title 18 imposes penalties on anyone who et seq. The False Statements Act currently imposes penalties on anyone who:

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

The penalties for a violation are fines of up to \$250,000 or imprisonment up to 5 years per violation.

To encourage the Department of Justice (DOJ) to prosecute small business fraud cases, this bill adds a new penalty to Title 18 (to be codified at 18 U.S.C. § 1041) prohibiting misrepresentation of status as a small business concern.” The new section clarifies that if a false statement is made regarding a concern’s small business status or compliance with the provisions of the Small Business Act (the Act), and the statement is intended to help the concern win, keep or perform on a federal contract, additional penalties will apply. Specifically, the entity making the false statement will be fined the greater of \$1,000,000 or twice the contract value in addition to the standard penalties. This penalty should not be offset by the value of the goods or services received, and should thus more than cover the cost of enforcement.

*Subsection (b)—Technical Amendment*

Subsection (b) adds the new Section 1041 to the table of contents for the chapter.

*Section 3—Safe harbor for good faith compliance efforts**Subsection (a)—Small Business Fraud*

Section 16(d) of the Act currently imposes penalties on those who misrepresent themselves as a small business concern or subcategory thereof. However, the determination of which businesses are small is not always a simple process. While SBA assigns a size standard to each industry, a firm must also be independently owned and operated in order to be considered small. These ownership and control issues are addressed in a great deal of detail in 13 CFR § 121.103, which addresses whether two firms are affiliated; that is, do they have enough overlap in ownership and control to be considered jointly for purposes of size. However, determining affiliation may sometimes be more art than science, since “[i]n de-

termining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.”<sup>14</sup> Unfortunately, SBA will not offer advisory opinions on matters of size and affiliation.

Consequently, a firm may not be able to have absolute certainty whether or not it is small. Stronger penalties could have the unintended consequence of dissuading legitimate small businesses in a complicated but legitimate business arrangement from pursuing contracting opportunities. As this bill insists on greater enforcement of the Act as relates to fraud, it is not the intention of the Committee to unnecessarily frighten those firms in a gray area when determining affiliation, only to encourage them to proceed thoughtfully.

Therefore, the bill adds a new paragraph (3) to Section 16(d). This new paragraph clarifies that a firm may protect itself against any allegations of bad faith behavior by obtaining a written advisory opinion from outside counsel. Such an opinion letter will establish that the firm is attempting to comply, thus allowing firms to thoughtfully explore and address affiliation issues while still pursuing opportunities. Concerns have been raised that this will be a tax on small businesses, and that all small firms will feel compelled to provide such a letter.

While such an argument has a patina of logic, removing the sheen shows that argument to be false. Most small businesses do not operate in a manner that calls into question the complex and opaque affiliation rules. Thus, most small businesses will have no reason to obtain a safe-harbor opinion. No negative inference can be drawn from a failure to have sought outside counsel’s opinion, so there should not be any compulsion. Likewise, some have raised a fear of “opinion mills”—attorneys happy to provide anyone with an opinion letter stating that a representation is reasonable. However, since these cases will be adjudicated before the Office of Hearings and Appeals or a federal court, any attorney engaging in such behavior is putting their license and livelihood at risk. Furthermore, clients receiving advice contrary to the law will always have the ability to bring a malpractice suit against their attorney. Thus, the risk of these “opinion mills” is minimal.

#### *Subsection (b)—Misrepresentation of Status*

The same concerns raised by subsection (a) apply to the new section 1041 added by this bill. Therefore, the new section 1041 also includes a safe harbor for those acting in reliance on a written advisory opinion letter from outside counsel. However, the safe harbor does not apply to paragraph (1) of the new section 1041(a), because it would be impossible to have an attorney’s opinion stating that is reasonable to falsify their status as a small business.

#### *Subsection (c)—Regulations*

The Administrator is instructed to issue regulations implementing the changes in subsection (b) within 270 days of enactment of this bill, and is instructed to define the elements of an adequate advisory opinion. This should insure that these opinion let-

<sup>14</sup> 13 CFR § 121.103(a)(5).

ters contain enough specificity to make them useful tools for the small businesses soliciting them and to prevent the aforementioned “opinion mill” issue. It is expected that these regulations would require a detailed examination of the concern’s structure and practices as relates to the relevant provisions of law, that such a letter would not contradict any firm-specific opinions issued by SBA, and that the opinions would be of limited duration.

*Subsection (c)—Small Business Compliance Guide*

Pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996,<sup>15</sup> the Administrator is instructed to issue a small entity compliance guide within 270 days of enactment of this bill. This guide must also be translated into Spanish and may be provided in digital format by the Administrator. This guide should help concerns assess whether they are a small business. Any firm acting in reliance on such a guide is entitled to use it as evidence of the reasonableness or appropriateness of any actions.<sup>16</sup> This should also help small businesses avoid needing to obtain an outside counsel’s opinion in most situations.

*Section 4—Office of Hearings and Appeals*

*Subsection (a)—Chief Hearing Officer*

While not acknowledged in the Act, SBA has an office known as the Office of Hearings and Appeals (OHA). This office makes determinations of size status, program eligibility, and hears other administrative law matters for the Administrator. Section 4 formally establishes OHA, first by creating the role of Chief Hearing Officer (CHO) in Section 4(b)(1) of the Act. Currently, this role is filled by an Associate Administrator, so this should not add any additional costs. The bill clarifies that the CHO is the head of OHA.

*Subsection (b)—Office of Hearings and Appeals Established in Administration*

Section 5 of the Act is amended to add a new subsection (i) which establishes OHA. In paragraph (1) of Section 5(i), the bill instructs this new office to impartially hear matters entitled to a hearing on the record as set forth in the Administrative Procedure Act. Additionally, OHA is formally recognized as the home of the Freedom of Information Act and Privacy Act Office.

In paragraph (2) of Section 5(i), the qualifications and duties of the CHO are delineated. The CHO must be a licensed attorney, and may not be a political appointee. The CHO is to be a member of the Senior Executive Service the highest grade of civil servants aside from those confirmed by the Senate. The CHO will serve as the Chief Administrative Law Judge, and be responsible for the operations and management of OHA. The CHO is allowed to use alternative dispute resolution to resolve cases.

Paragraph (3) addresses the principal employees of OHA, the administrative law judges. They, too, are required to be licensed attorneys, and are to be Senior Level employees. This is a level of civil servant above the general schedule employee, but without the management responsibilities inherent in the Senior Executive Serv-

<sup>15</sup> Pub. Law 104–121, 110 Stat. 847.

<sup>16</sup> *Id.* at § 212.

ice. Current administrative judges and administrative law judges will be retained as administrative law judges upon enactment of this bill, and they will each have the ability to conduct hearings and render decisions in accordance with 5 U.S.C. §§ 554, 556 and 557. This conveys the ability to administer oaths, take testimony, and other functions inherent to administrative appeals. The use of the term “administrative law judge” does not connote that these individuals are necessarily appointed pursuant to § 3105 of Title V, United States Code. Rather it refers to their function as adjudicators for the Administrator, i.e., the generic term for individuals under the Administrative Procedures Act who conduct hearings to avoid the appearance of bias that would occur if other agency personnel conducted the hearing. The use of administrative law judges existed long before any use of the term in federal personnel hiring law.

As these functions and individuals already exist within the SBA, so this bill should not incur any costs. Instead, this bill formalizes and recognizes the important work OHA does to deter and identify fraud and misrepresentation in the small business programs.

*Section 5—Requirement fraudulent businesses be suspended or debarred*

Suspension and debarment are the processes by which the federal government determines that an individual or company is not sufficiently responsible to do business with, and declares the individual or entity ineligible for the award of new contracts. Suspension occurs with the determination is not permanent, such as when an investigation is being conducted, or an indictment issued but no conviction has resulted. Debarment is disqualification for a set period of time after the offense has been definitively proven.

*Subsection (a)—In General*

Section 16(d)(2) of the Act currently permits suspension and debarment of firms or individuals who have misrepresented their size status or eligibility for a program of the SBA. However, it only allows suspension or debarment if the misrepresentation “indicates a lack of business integrity that seriously and directly affects the present responsibility to perform any contract awarded by the [f]ederal [g]overnment or a subcontract under such a contract.”

As a consequence, in their October 27, 2011, testimony, the Inspectors General (IGs) stated that suspension and debarment are not used as deterrent or punishments for many bad actors abusing the small business programs. As an analogy, they explained that any firm that mislabels a product as “Made in America” is subject to potential suspension and debarment. This may be because they lack business integrity, or because they lack appropriate quality control, or a number of other reasons the government uses when weighing whether a firm is presently responsible. However, in cases of small business misrepresentation, only one potential reason for suspension or debarment is permitted, which binds the hands of those seeking to protect the government.

Therefore, the bill removes the requirement that the misrepresentation establish a lack of business integrity, and instead provides an evidentiary standard. For suspension, the standard is adequate evidence, since it will allow the government to quickly but

temporarily address fraud. However, for debarment, the standard is the more stringent preponderance of the evidence. This change should prove a powerful deterrent while not harming those who make good faith errors.

*Subsection (b)—Revision to the FAR*

The Federal Acquisition Regulation (FAR) provides regulatory guidance for suspension and debarment. Therefore, the bill instructs the Federal Acquisition Regulatory Counsel to update the FAR with 270 days of enactment, in keeping with the changes made in the bill.

*Subsection (c)—Publication of Procedures Regarding Suspension and Debarment*

*Subsection (d)—Required Regulations*

While the FAR provides the general framework for suspension and debarment, each agency has its own procedures for implementation. This provision instructs the Administrator to publish the SBA's suspension and debarment standard operating procedures and the name and contact information for the suspension and debarment official on the SBA website within 270 days of enactment. The bill also instructs the Administrator to issue regulations within 270 days that define the evidentiary threshold of adequate evidence used for suspension.

*Section 6—Annual report on suspensions and debarments proposed by Small Business Administration*

*Subsection (a)—Report Requirement*

Subsection (a) requires the Administrator to annually report to the Committee on Small Business and the Committee on Small Business and Entrepreneurship on all suspension and debarment actions taken within the preceding year.

*Subsection (b)—Matters Covered*

The report required by subsection (a) must include the number of contractors proposed for suspension or debarment, the agency or office originating the proposal, the reasons for the proposal, the results of the proposal, the reason for the results, and which proposal were referred to the IG or the Department of Justice. These requirements are included because the IGs indicated that many cases are referred for suspension or debarment, but only three contractors have been suspended or debarred in the last several years. This discrepancy may be appropriate, but deserves the Committee's oversight and may lead to further refinements of the suspension and debarment provisions. Subsection (b) provides that the report may redact the names of any firms or individuals in order to protect an ongoing investigation.

*Section 7—Sense of Congress*

When OHA hears cases on size, it compiles a record that should illuminate whether the concern before it acted reasonably. Therefore, it is the sense of Congress that SBA employees award that a firm acted unreasonable should refer such cases to the IG or the Department of Justice. It is expected that the individuals making

the referrals would be employees of the Office of Government Contracting and Business Development or a similar entity.

VIII. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, May 9, 2012.*

Hon. SAM GRAVES,  
*Chairman, Committee on Small Business,*  
*House Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 4206, the Contracting Oversight for Small Business Jobs Act of 2012.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susan Willie.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

*H.R. 4206—Contracting Oversight for Small Business Jobs Act of 2012*

H.R. 4206 would increase the monetary penalty for firms that misrepresent their status as a small business concern in order to obtain government contracts; the bill provides a safe harbor from the penalty, however, if a firm can show that it relied on the opinion of an outside attorney when asserting that it is a small business. The bill also would codify the organization of the Office of Hearings and Appeals, an independent office within the Small Business Administration (SBA) and would require the SBA to prepare a new report for the Congress detailing actions taken each year to suspend or exclude firms from opportunities to win government contracts. Finally, the bill would change the standard to determine when a firm should be suspended or excluded from receiving government contracts for misrepresenting its size.

Based on information from the SBA, CBO estimates that implementing the provisions of H.R. 4206 would cost less than \$500,000 in any year and about \$2 million over the 2013–2017 period, assuming appropriation of the necessary amounts. That amount would be used for additional staff resources to develop new regulations and to handle the additional workload that the new rules would create.

Pay-as-you-go procedures apply to this legislation because it would affect direct spending and revenues. The federal government could collect more criminal penalties if H.R. 4206 is enacted; such penalties are recorded as revenues, deposited in the Crime Victims Fund, and later spent. Based on collections of penalties for similar violations under current law, CBO expects that any additional revenues and direct spending under this bill would have no net effect on the budget.

H.R. 4206 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Susan Willie. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

#### IX. UNFUNDED MANDATES

H.R. 4206 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act, Pub. L. No. 104-4, and would impose no costs on state, local or tribal governments.

#### X. NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House, the Committee provides the following opinion and estimate with respect to new budget authority, entitlement authority and tax expenditures.

The Committee does not adopt as its own the estimate of new budget authority contained in the cost estimate prepared by the Director of the Congressional Budget Office (CBO) pursuant to 402 of the Congressional Budget Act of 1974. CBO estimates that implementing the provisions of H.R. 4206 will cost about \$2 million over five years. Since SBA already has an Office of Hearings and Appeals, this codification will add no new expenses. Recoveries on any fraud prosecutions resulting from this legislation will cover the cost of litigation. Therefore, the only additional costs will be preparing reports and promulgating regulations. Such costs, the Committee believes, would be handled under existing levels of appropriations for agency salary and expenses. However, the costs will be incurred are simply opportunity costs, as current personnel will need to prioritize revising plans and promulgating regulations. Thus, the Committee does not believe that any additional appropriations will be necessary to implement this legislation.

#### XI. OVERSIGHT FINDINGS

In accordance with clause (2)(b)(1) of rule X of the Rules of the House, the oversight findings and recommendations of the Committee on Small Business with respect to the subject matter contained in H.R. 4206 are incorporated into the descriptive portions of this report.

#### XII. STATEMENT OF CONSTITUTIONAL AUTHORITY

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the authority for this legislation in Art. I, § 8, cls. 1, 3, and 18 and Art. IV, § 3, cl. 2 of the Constitution of the United States.

#### XIII. CONGRESSIONAL ACCOUNTABILITY ACT

H.R. 4206 does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of § 102(b)(3) of Pub. L. No. 104-1.



## XIV. FEDERAL ADVISORY COMMITTEE ACT STATEMENT

H.R. 4206 does not establish or authorize the establishment of any new advisory committees as that term is defined in the Federal Advisory Committee Act, 5 U.S.C. App. 2.

## XV. STATEMENT OF NO EARMARKS

Pursuant to clause 9 of rule XXI, H.R. 4206 does not contain any congressional earmarks, limited tax benefits or limited tariff benefits as defined in subsections (d), (e) or (f) of clause 9 of rule XXI of the Rules of the House.

## XVI. PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House, the Committee establishes the following performance-related goals and objectives for this legislation:

H.R. 4206 includes a number of provisions designed to improve the competitive viability of small businesses by reducing fraud, enhance small business contracting oversight, and to improve agency compliance with the Small Business Act.

## XVII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

## TITLE 18, UNITED STATES CODE

\* \* \* \* \*

## PART I—CRIMES

\* \* \* \* \*

## CHAPTER 47—FRAUD AND FALSE STATEMENTS

Sec.

1001. Statements or entries generally.

\* \* \* \* \*

1041. *Misrepresentation of status as a small business concern.*

\* \* \* \* \*

**§ 1041. *Misrepresentation of status as a small business concern***

(a) *IN GENERAL.*—Whoever knowingly—

(1) *falsifies, conceals, or covers up by any trick, scheme, or device a material fact;*

(2) *makes any materially false, fictitious, or fraudulent statement or representation; or*

(3) *makes or uses any false writing or document, including electronically, knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;*

*concerning status as a small business concern or compliance with the requirements of the Small Business Act in an effort to obtain, retain, or complete a federal government contract shall be fined \$1,000,000 or in a sum equal to twice the amount or value of goods or services under the contract or order, whichever is greater, imprisoned not more than 5 years, or both.*

*(b) EXCEPTION.—This section shall not apply to any conduct in violation of paragraph (2) or (3) of subsection (a) if the defendant acted in reliance on a written advisory opinion from a licensed attorney who is not an employee of the defendant.*

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## SMALL BUSINESS ACT

\* \* \* \* \*

### SEC. 4. (a) \* \* \*

(b)(1) The management of the Administration shall be vested in an Administrator who shall be appointed from civilian life by the President, by and with the advice and consent of the Senate, and who shall be a person of outstanding qualifications known to be familiar and sympathetic with small business needs and problems. The Administrator shall not engage in any other business, vocation, or employment than that of serving as Administrator. In carrying out the programs administered by the Small Business Administration including its lending and guaranteeing functions, the Administrator shall not discriminate on the basis of sex or marital status against any person or small business concern applying for or receiving assistance from the Small Business Administration, and the Small Business Administration shall give special consideration to veterans of the Armed Forces of the United States and their survivors or dependents. The President also may appoint a Deputy Administrator, by and with the advice and consent of the Senate. The Administrator is authorized to appoint Associate Administrators (including the Associate Administrator specified in section 201 of the Small Business Investment Act of 1958) to assist in the execution of the functions vested in the Administration. One such Associate Administrator shall be the Associate Administrator for Veterans Business Development, who shall administer the Office of Veterans Business Development established under section 32. One of the Associate Administrators shall be designated at the time of his appointment as the Associate Administrator for Minority Small Business and Capital Ownership Development who shall be an employee in the competitive service or in the Senior Executive Service and a career appointee and shall be responsible to the Administrator for the formulation and execution of the policies and programs under sections 7(j) and 8(a) of this Act which provide assistance to minority small business concerns. One such Associate Administrator shall be the Associate Administrator for International Trade, who shall be the head of the Office of International Trade established under section 22. *One shall be designated at the time of his or her appointment as the Chief Hearing Officer, who shall head and administer the Office of Hearings and Appeals within the Administration.*

\* \* \* \* \*

## SEC. 5. (a) \* \* \*

\* \* \* \* \*

## (i) OFFICE OF HEARINGS AND APPEALS.—

(1) *IN GENERAL.*—*There is established in the Administration an Office of Hearings and Appeals—*

(A) *to impartially decide such matters, where Congress designates that a hearing on the record is required or which the Administrator designates by regulation or otherwise; and*

(B) *which shall contain the Administration's Freedom of Information/Privacy Acts Office.*

(2) *CHIEF HEARING OFFICER.*—*The Chief Hearing Officer shall be a career member of the Senior Executive Service and an attorney duly licensed by any State, commonwealth, territory, or the District of Columbia.*

(A) *DUTIES.*—*The Chief Hearing Officer shall—*

(i) *serve as the Chief Administrative Law Judge; and*

(ii) *be responsible for the operation and management of the Office of Hearings and Appeals, pursuant to the rules of practice established by the Administrator.*

(B) *ALTERNATIVE DISPUTE RESOLUTION.*—*The Chief Hearing Officer may also assign a matter for mediation or other means of alternative dispute resolution.*

## (3) ADMINISTRATIVE LAW JUDGES.—

(A) *IN GENERAL.*—*An administrative law judge shall be an attorney duly licensed by any State, commonwealth, territory, or the District of Columbia.*

(B) *CONDITIONS OF EMPLOYMENT.*—(i) *An administrative law judge shall serve in the excepted service as an employee of the Administration under section 2103 of title 5, United States Code, and under the supervision of the Chief Hearing Officer.*

(ii) *Administrative law judge positions shall be classified at Senior Level, as such term is defined in section 5376 of title 5, United States Code.*

(iii) *Compensation for administrative law judge positions shall be set in accordance with the pay rates of section 5376 of title 5, United States Code.*

(C) *TREATMENT OF CURRENT PERSONNEL.*—*An individual serving as a Judge in the Office of Hearings and Appeals (as that position and office are designated in section 134.101 of title 13, Code of Federal Regulations (as in effect on January 1, 2012)) on the effective date of this subsection shall be considered as qualified to be and redesignated as administrative law judges.*

(D) *POWERS.*—*An administrative law judge shall have the authority to conduct hearings in accordance with sections 554, 556, and 557 of title 5, United States Code.*

\* \* \* \* \*

## SEC. 16. (a) \* \* \*

\* \* \* \* \*

## (d)(1) \* \* \*

(2) Any person who violates paragraph (1) shall—

(A) \* \* \*

\* \* \* \* \*

(C) be subject to suspension and debarment as specified in subpart 9.4 of title 48, Code of Federal Regulations (or any successor regulation) [on the basis that such misrepresentation indicates a lack of business integrity that seriously and directly affects the present responsibility to perform any contract awarded by the Federal Government or a subcontract under such a contract] *if the misrepresentation is established by a preponderance of the evidence (in the case of debarment) or adequate evidence (in the case of suspension); and*

\* \* \* \* \*

(3) *LIMITATION ON LIABILITY.—This subsection shall not apply to any conduct in violation of subsection (a) if the defendant acted in reliance on a written advisory opinion from a licensed attorney who is not an employee of the defendant.*

\* \* \* \* \*

